PERWIRA HABIB BANK MALAYSIA BHD.

v.

DIPRI TRADING SDN. BHD. & 3 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-1575-92]
22 FEBRUARY 1994

BANKING LAW: Application for inspection and possession of copies of documents in the possession of a bank - Application made under s. 7 Bankers' Books (Evidence) Act 1949 - Application made at interlocutory stage of proceedings - Whether application premature - Whether application bona fide.

The plaintiff had granted a loan facility to the first defendant in return for four pieces of property as security which property had earlier been charged to Malayan Banking Berhad (MBB). The plaintiff applied, under s. 7 of the Bankers' Books (Evidence) Act 1949 (the Act), for an order that they be given liberty to inspect and take possession of copies of the documents in the possession of MBB relating to the discharge of the four pieces of property which had been redeemed by the plaintiff for the sum of RM2 million.

Learned Counsel for the plaintiff contended that the documents with MBB was relevant for the purpose of deciding whether the first defendant knew of, consented to, or instructed the payment of the RM 2 million.

Counsel for the first defendant submitted that to grant discovery at this stage would be improper and premature as it was the plaintiff who had released the money to MBB and they should themselves therefore be in possession of the relevant documents relating to the release. Counsel further contended that the statutory provision under which the application was made only applies when *viva voce* evidence needs to be tendered at the trial.

Held:

[1] The expression "legal proceeding" in s. 7 of the Act has been defined as any civil or criminal proceeding or inquiry in which evidence is or may be given and includes an arbitration. It was quite clear that no distinction has been made as to whether such applications can only be made for trial purposes or for interlocutory matters as well. The fact that there has been no reply to the plaintiff's affidavit in support of their application strengthens their case consequent upon the absence of any challenge from the defendants.

[2] There was no doubt as to the *bona fides* of the application and it is quite necessary for the inspection and taking possession to be done for the further conduct of these proceedings. To deprive the plaintiff of this evidence at the interlocutory stage would make a mockery of the provisions of the Act itself.

[Plaintiff's application allowed. Each party to bear their own costs].

Case referred to:
Arnott v. Hayes [1887] Ch. Vol. xxxvi 731 ***(refd)***

Legislation referred to:
Bankers' Books (Evidence) Act 1949, s. 7
Rules of the High Court 1980, O. 14, O. 18 r. 19

For the plaintiff - W.M. Chang; M/s. Raja Darryl & Loh
For the first defendant - P.S. Gill; M/s. Gill & Tang
For the second defendant - Ramdas Tikamdas; M/s. Siva, Ram & Associates

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

By summons in chambers filed on 4 June 1993, the plaintiff had asked for an order that they be given the liberty to inspect and take possession of copies of the documents in the possession of Malayan Banking Bhd. (hereinafter "MBB") relating to the discharge of four pieces of land namely HS (D) 5851, Lot 6116, Mukim Damansara, Daerah Petaling; HS(D) 5090 Lot 29672, Mukim Kuala Lumpur, Wilayah Persekutuan; LO 15404467 Lot 96, Mukim Kota Kinabalu; and Geran 1209, Lot 46, Bandar Kuala Lumpur, in favour of MBB where payment had been made by the plaintiff vide cashier's order number 489747, for costs in the cause and for other consequential orders the Court deems fit.

Learned Counsel for the plaintiff had, with his usual eloquence, outlined the facts in support of their application. The application, he said, was made under s. 7 of the Bankers' Books (Evidence) Act 1949 (hereinafter "the Act"). The plaintiff had granted a loan facility of RM5 million to the first defendant, with these four properties as security, which had earlier been charged to MBB for RM2.75 million. This

redemption sum was paid on 5 October 1990 and the charges were accordingly discharged. Subsequently, on 9 November 1990, the same four properties were charged to the plaintiff as security for the present loans and the issue was whether the redemption sum paid by the plaintiff to MBB was proper in the circumstances as the defendants had only agreed to RM750,000 being paid and not the RM2 million. Learned Counsel had stated that the documents with MBB was relevant for the purpose of deciding whether the first defendant knew of, consented to, or instructed, the payment of the RM 2 million. He had added that their affidavit in support had not been replied to.

Learned Counsel for the first defendant had quite candidly strenuously objected to the application submitting that it was premature as the statement of defence and counter claim had raised issues of fact and law which would need to be clarified at a full trial. Whether this evidence was necessary at the trial, he continued, was a different matter altogether. He had further argued that the plaintiff had filed the application under O. 14, on the basis that the first defendant had no defence, and the application under O. 18 r. 19, to strike out the counterclaim. He said that all these hinged on the facilities granted by the plaintiff to the first defendant in terms of the letter of offer and for the said two applications by the plaintiff, the Court is only concerned with the plaintiff's letter of offer, type of facility granted and whether they were properly issued.

To grant discovery at this stage, he added, was improper and premature as it was the plaintiff who had released the money to MBB and should themselves therefore be in possession of the relevant documents relating to the release. He said that the relevant statutory provision under which the application was made only applies when *viva voce* evidence needs to be tendered at the trial. He also said that the fact this application had been made shows that the applications under O. 14 and O. 18 r. 19 respectively were not plain and obvious cases as the plaintiff was depending on this discovery to bolster those applications.

Section 7 of the Act reads:

> 7.(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.
>
> (2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or Judge otherwise directs.

The expression "legal proceeding" has also been defined as any civil or criminal proceeding or inquiry in which evidence is or may be given and includes an arbitration. It is quite clear that no distinction has been made as to whether such applications can only be made for trial purposes only or for interlocutory matters as well. The fact that there has been no reply to the plaintiff's affidavit in support only strengthens their case consequent upon the absence of challenge from the defendants.

The case of *Arnott v. Hayes* [1887] Ch. Vol. xxxvi 731 had ruled that an order giving liberty to inspect a banker's books and take copies of any entries therein for the purposes of legal proceedings may be made on the application of a party to such proceedings *exparte* and without evidence. Here, the plaintiff had gone further, as advised in that same case, by giving notice of the application on the person whose account is to be inspected, and this Court had in fact in this application heard both parties. The Act had also specifically provided that MBB need not be made a party.

In these circumstances, I had no doubts as to the *bona fides* of this application and was of the view that it is quite necessary for the inspection and taking possession to be done for the further conduct of these proceedings. Although learned Counsel for the first defendant had said that they would not object to this application at the trial stage, it was my finding that to deprive the plaintiff of this evidence at the interlocutory stage was making a mockery of the provisions in the Act itself. I had accordingly granted the plaintiff the order in terms of their application but had ordered each party to bear their own costs.